

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2218

Cir. Ct. No. 2010CF208

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM W. MILLER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for La Crosse County:
SCOTT L. HORNE, Judge. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Adam Miller, pro se, appeals orders denying his postconviction motion to vacate his sentence and his motion for reconsideration. Miller argues that the circuit court erred when it applied a penalty enhancer to increase his term of initial confinement in prison without first

imposing the maximum term of imprisonment, contrary to WIS. STAT. § 939.62(1) (2011-12)¹ and *State v. Harris*, 119 Wis. 2d 612, 350 N.W.2d 633 (1984). The State argues that the circuit court properly applied a penalty enhancer to Miller’s sentence because “there is no statute or case law that provides that a sentencing court can impose a penalty enhancer only after it has first imposed the maximum term of imprisonment.”

¶2 Based on our interpretation of WIS. STAT. §§ 939.62(1) and 973.01(2)(c), we conclude that a court may apply a penalty enhancer to increase the term of initial confinement beyond the maximum prescribed by law without first imposing the maximum term of imprisonment, including both initial confinement and extended supervision. Here, the circuit court properly applied a penalty enhancer to impose a term of initial confinement longer than the maximum term of initial confinement prescribed by law. We therefore affirm the circuit court’s orders.

BACKGROUND

¶3 The sentence at issue in this case was imposed following Miller’s conviction for burglary while armed with a dangerous weapon as a “repeater,” in violation of WIS. STAT. §§ 943.10(2)(a) and 939.62(1)(c).

¶4 Burglary while armed with a dangerous weapon is a Class E felony. WIS. STAT. § 943.10(2)(a). The maximum term of imprisonment for a Class E felony is fifteen years. WIS. STAT. § 939.50(3)(e). The term of imprisonment

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

must be bifurcated between a term of initial confinement and a term of extended supervision. WIS. STAT. § 973.01(2). The maximum term of initial confinement for a Class E felony is ten years, and the maximum term of extended supervision is five years. WIS. STAT. § 973.01(2)(b)5. and (d)4. Because Miller was a “repeater” with prior misdemeanor convictions, the maximum term of imprisonment could be increased by up to two years pursuant to WIS. STAT. § 939.62(1)(c).

¶5 In addressing the count of conviction at issue here at the sentencing hearing, the circuit court stated that Miller faced the following maximum penalty: “[Twelve] years [of] initial confinement, ten plus an additional two for the [penalty] enhancer, plus five years [of] extended supervision.” The circuit court sentenced Miller to eleven years of initial confinement and four years of extended supervision, for a total length of sentence of fifteen years.

¶6 Miller moved for postconviction relief, requesting that the circuit court vacate his sentence. Miller argued that the circuit court “imposed a sentence which included ... a penalty enhancer ... without first imposing the maximum term of imprisonment on the underlying offense,” contrary to WIS. STAT. § 939.62(1) and *Harris*. The circuit court denied the motion. Miller moved for reconsideration, and the circuit court denied the motion for reconsideration.

DISCUSSION

¶7 In this appeal, Miller reasserts his argument that the circuit court erred by applying a penalty enhancer to increase his term of initial confinement without first imposing “the maximum underlying sentence,” contrary to WIS. STAT. § 939.62(1) and *Harris*. The State responds that “there is no statute or case

law that provides that a sentencing court can impose a penalty enhancer only after it has first imposed the maximum term of imprisonment.”

¶8 The issues presented in this appeal require us to interpret WIS. STAT. §§ 939.62(1) and 973.01(2)(c), which govern penalty enhancers, and apply these statutes to undisputed facts. This is a question of law, which we review *de novo*. ***Rutter v. Copper***, 2012 WI App 128, ¶10, 344 Wis. 2d 596, 824 N.W.2d 885.

¶9 The penalty enhancer at issue in this case is set forth at WIS. STAT. § 939.62(1), which provides in pertinent part:

If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed, ... the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

....

(c) A maximum term of imprisonment of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

Section 939.62(1) applies to Miller because Miller conceded that he was a “repeater” on the basis of his prior misdemeanor convictions. Accordingly, § 939.62(1) authorizes Miller’s “maximum term of imprisonment” as prescribed by law to be increased by up to two years.

¶10 To understand the procedure for applying the penalty enhancer set forth at WIS. STAT. § 939.62(1), we look to WIS. STAT. § 973.01(2)(c), which provides:

Subject to the minimum period of extended supervision required under par. (d), the *maximum term of confinement in prison* specified in par. (b) may be increased by any applicable penalty enhancement statute. If the maximum

term of confinement in prison specified in par. (b) is increased under this paragraph, the total length of the bifurcated sentence that may be imposed is increased by the same amount.

(Emphasis added.)

¶11 Read together, WIS. STAT. §§ 939.62(1) and 973.01(2)(c) permit a circuit court, in its discretion, to apply a penalty enhancer to increase an individual’s term of initial confinement, which thereby increases the “total length of the bifurcated sentence.” In this case, the circuit court was authorized to increase Miller’s term of initial confinement by up to two years, and to increase the total length of his bifurcated sentence accordingly, pursuant to §§ 939.62(1) and 973.01(2)(c).

¶12 Miller interprets WIS. STAT. § 939.62(1) to authorize a circuit court to apply a penalty enhancer only after imposing the maximum term of initial confinement *and* the maximum term of extended supervision. The statute contains no language setting forth such a requirement. Moreover, Miller’s interpretation of § 939.62(1) is contrary to the legislative history regarding penalty enhancers that this court discussed in *State v. Volk*, 2002 WI App 274, ¶43, 258 Wis. 2d 584, 654 N.W.2d 24. The issue in *Volk* was whether the circuit court erroneously applied a penalty enhancer to the extended supervision term of the defendant’s bifurcated sentence. *Id.*, ¶2. In reaching our holding that WIS. STAT. § 973.01(2)(c) does not allow a circuit court to impose any portion of a penalty enhancer as extended supervision, we relied upon legislative history regarding penalty enhancers. *Id.*, ¶¶41-42. We explained that the “legislative history ... establishes that the legislature wanted a habitual criminal’s term of confinement enhanced—not the term of extended supervision,” because enhancing the term of confinement “confers greater protection to the public from those who have already

demonstrated a propensity to engage in criminal behavior.” *Id.*, ¶43. This legislative history supports our conclusion that §§ 939.62(1) and 973.01(2)(c), when read together, permit a circuit court to apply a penalty enhancer to increase an individual’s term of initial confinement beyond the maximum prescribed by law, without first imposing the maximum term of initial confinement and the maximum term of extended supervision.

¶13 Miller also contends that the supreme court’s opinion in *Harris* supports his argument that a court must impose “the maximum underlying sentence” before applying a penalty enhancer. For the reasons that follow, we disagree.

¶14 In *Harris*, the supreme court reviewed a sentence imposed by the circuit court that included a penalty enhancer. *Harris*, 119 Wis. 2d at 613-14. *Harris* was a pre-Truth in Sentencing case. Harris was convicted of attempted robbery, which carried a maximum, indeterminate sentence of five years of imprisonment. *Id.* at 615-16. Because Harris was a “repeater,” the maximum sentence could be increased by up to two years. *Id.* at 614-15 and n.2. The circuit court sentenced Harris to an indeterminate term of imprisonment of three years, and stated that six months of the sentence was imposed based on Harris’s status as a “repeater.” *Id.* at 615. The supreme court concluded that the circuit court erred by imposing six months “in consideration of the ‘repeater’ status of the defendant,” because the circuit court had not first imposed the maximum underlying sentence before applying the penalty enhancer. *Id.* at 625. The supreme court explained: “The repeater statute, [WIS. STAT. §] 939.62[] ... is not applicable to the sentence of a defendant unless the [circuit] court seeks to impose a sentence in excess of that prescribed by law for the crime for which the defendant is convicted.” *Id.* at 619. If the court determines that “an increase in

the penalty prescribed by law for the crime of which the defendant is convicted is ... warranted,” the court may exercise its discretion and apply a penalty enhancer pursuant to WIS. STAT. § 939.62. **Harris**, 119 Wis. 2d at 618.

¶15 Miller’s reliance on **Harris** is unavailing for two reasons. First, **Harris** is readily distinguishable from Miller’s case. **Harris** was a pre-Truth in Sentencing case, and the circuit court in **Harris** imposed an indeterminate sentence, whereas the circuit court here imposed a bifurcated sentence composed of fixed terms of initial confinement and extended supervision. **Id.** at 615. In addition, the sentence imposed by the circuit court in **Harris** was below the maximum permitted by law, while the circuit court here imposed a term of initial confinement that was one year longer than the maximum prescribed by law. **Id.** at 616.

¶16 Second, the conclusion in **Harris** supports the circuit court’s application of a penalty enhancer to Miller’s sentence. As the supreme court in **Harris** explained, WIS. STAT. § 939.62 “is not applicable to the sentence of a defendant unless the [circuit] court seeks to impose a sentence *in excess of that prescribed by law* for the crime for which the defendant is convicted.” **Harris**, 119 Wis. 2d at 619 (emphasis added). Consistent with this proposition, the circuit court here sought to impose an eleven-year term of initial confinement, which was one year “in excess of” the maximum ten-year term of initial confinement prescribed by WIS. STAT. § 973.01(2)(b)5.

CONCLUSION

¶17 For the reasons set forth above, we conclude that the circuit court properly applied a penalty enhancer to increase Miller’s term of initial

confinement beyond the maximum prescribed by law, and we reject Miller’s arguments to the contrary. We therefore affirm the circuit court’s orders.²

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

² Miller asks this court to reverse the circuit court’s orders and “declare[] void” the “faulty [one-year] repeater portion of his sentence.” Because we affirm the circuit court, we do not grant Miller the relief he seeks. However, we note that in a similar case, where we overturned a component of a bifurcated sentence, we explained that the proper remedy in such a case is to reverse the sentence and remand for resentencing. *State v. Volk*, 2002 WI App 274, ¶48, 258 Wis. 2d 584, 654 N.W.2d 24.

